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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 76.

AMELIA C. TRAVERS ET AL., APPELLANTS,

vs.

MARIA L. REINHARDT ET AL., APPELLEES.

APPELLANTS' BRIEF.

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Statement of Facts.

Nicholas Travers, Sr., late of the District of Columbia, died in January, 1849, seized of real estate in the city of Washington, much of which is business property located in squares 291 and 379, and now of great value. He left four sons and three daughters, to wit: Nicholas, Jr., Joseph, James, Elias, Sydney V. Mitchell, Mary Wynne, and Elizabeth, also known as Sister Agatha. He died testate, and his will and codicils will be found commencing on page 141 of the record. A caveat was filed against the will on behalf of the daughters, and issues were framed and tried in 1851, the result of the trial being in favor of the will, which was duly probated in the Orphans' Court of this District. By the will the testator made two classes of devises to his sons. By the first class an absolute fee is devised, in which the words "in fee simple" are used. The second class does not embrace those words, the distinction being expressly

recognized and treated by the testator in a general provision, which is set forth in the will as follows:

> "With regard to the several estates hereinbefore devised to my several sons, it is hereby declared to be my will, and I do order and direct, as a general provision, that if any of my sons should die without leaving a wife, or a child, or children living at his death, then his estate herein devised to him, saving and excepting those portions thereof expressly granted and so named to be 'in fee simple,' and which they can sell and dispose of as they think fit, shall go, and be invested in fee, to my surviving sons and the child or children of such as may be dead, such child or children representing the share of the father—but if either of my sons shall at his death leave a wife, either with or without a child or children, such wife shall be entitled to her dower rights and privileges."

There is no contest over the first class of devises above mentioned, the litigation here being confined to the devises of the second class, made to the sons Joseph and James of property in square 291.

Pending the controversy over the will, Nicholas, Jr., died unmarried and intestate, and in the year 1852, a partition by deed was had of the estate devised to him by his father's will, among the three surviving brothers, Joseph, James, and Elias, the deeds thereof being found on pages 135, 136, 137, 138, 139, and 140 of the record. From 1852 to 1882 these three brothers were seized and possessed, without question, of all the property devised to them respectively and to Nicholas, Jr., by the terms of their father's will. None of the sons of the testator except Elias, left any children. Joseph died intestate September 12, 1882, leaving a widow but no children; James died testate in October, 1883, without children. It is claimed by appellees that he left a widow, but this is disputed by appellants. Elias died intestate April 29, 1887, and left six children and a widow (since deceased),

surviving him. The children are the complainant, Charles E. Travers, and the defendants, John H., Joseph, James W., and Sidney Travers and Kate M. M. Owens, all of whom except Sidney, now deceased, are appellants to this court. Pending this suit, on May 5, 1901, Sidney, a son of Elias, died intestate, leaving his brothers and sister above mentioned as his only heirs at law (Rec. p. 33). Amelia C. Travers, wife and alienee of Charles E., is also an appellant.

James Travers, son of Nicholas, left a will in which he devised to his brothers and sisters "all his interest and property however held in the city of Washington and District of Columbia" (Rec. p. 129).

The bill in this cause is for partition by sale. The complainants are Charles E. Travers (son of Elias, who was the last surviving son of Nicholas, the testator), and Amelia, his wife and alienee (Rec. p. 3), while the defendants are the other heirs at law of said Elias *and the representatives of the daughters of the testator Nicholas.* There is no conflict of interest among the representatives of Elias Travers, the questions in controversy being between them as a class, and the representatives of the daughters of the testator Nicholas as a class, the heirs of Elias claiming, to the exclusion of the appellees, the properties taken by Joseph and James Travers, respectively, under the will of Nicholas and affected by the "general provision" thereof; the appellees claiming to share therein. The rights of the parties to the Joseph Travers property are to be determined by the construction to be given the will of Nicholas, while the rights to the James Travers property depend in addition upon questions of fact *de hors* the will, which may be stated in the form of questions as follows:

1st. Was James Travers lawfully married to Sophia V. Grayson?

2d. Did he leave a lawful child surviving him?

3d. Did James and Elias Travers enter into a binding agreement with their sisters which admitted the right of the sisters to share in the property devised to Joseph, James and Elias by their father, and estops the heirs of Elias to deny such right?

The contentions on the part of the appellees are:

1st. That upon the death of Joseph, leaving a widow, his estate became indefeasible, and forthwith descended to his heirs generally.

2d. That James married and died, leaving a widow, and the devise to him thereupon became indefeasible, and was carried by his will to his brothers and sisters equally.

3d. That birth of lawful issue was not necessary in either case to the absolute fee in each devisee, but marriage alone was sufficient.

4th. That in the lifetime of Joseph, James and Elias Travers an understanding was reached whereby the right of the sisters to share in the estate devised by Nicholas Travers was admitted, and—

> "that shortly after the death of Joseph and in December, 1882, this understanding was embodied in a written agreement wherein it was provided that in consideration of love and affection and to avoid any more dispute and litigation . . . the several lots which had been devised to the said Joseph, James, and Elias Travers should thereafter be considered freed from the trust provisions created by said will and codicils," and that "this agreement was recognized by James and Elias and carried into full force and effect" (Rec., pp. 20, 23).

The appellants contend:

1st. That the fee in each devisee was determined if he died without issue surviving, and that by the executory devise, it forthwith passed to his surviving brothers or brother.

2d. They concede that Joseph Travers married and left a widow; they deny that James Travers married, and say that his fee was at his death determined (under any construction of the will of his father), and passed to his only surviving brother, Elias, unaffected by the terms of James' will.

3d. They deny that any valid or binding agreement was made by Elias and James with their sisters, by which the latter were let in to share in the property, and claim that there is no proof of such agreement.

By agreement of the parties (Rec., p. 31) the property in dispute was decreed to be sold by trustees and the proceeds held in place thereof. The fund now in court is that part of the proceeds of sale of properties devised to Joseph Travers, and of properties devised to James Travers by their father, without the use of the words "in fee simple," which is claimed by the heirs of their sisters.

The cause having been referred to the auditor to distribute the fund, he found in favor of the sisters both as to the properties devised to Joseph, and those devised to James; Justice Gould, holding the equity court, affirmed this finding, as did the court of appeals, from whose judgment this appeal is taken.

Assignment of Errors.

The Court of Appeals erred:—

First. In holding that the estate vested in Joseph Travers by the will of his father, and covered by the general provision of such will, was not determined at the death of Joseph Travers without a surviving child.

Second. In holding in like manner as to the estate so devised to James Travers and covered by the same general provision.

Third. In holding that at the death of Joseph Travers

the estate so devised to him, and covered by such general provision, descended to his heirs at law.

Fourth. In holding that James Travers was married and left a wife surviving him.

Fifth. In holding that the will of James Travers was operative upon the premises in dispute, and that the representatives of his sisters were entitled to share in the proceeds of sales thereof.

Sixth. In holding that at the death of Joseph Travers the properties so devised to him by his father, Nicholas, did not pass to his surviving brothers, James and Elias, to the exclusion of their sisters.

Seventh. In holding that at the death of James the properties so devised to him by his father, Nicholas, did not pass to his surviving brother, Elias, to the exclusion of his sisters and their representatives.

ARGUMENT.

I.

The Joseph Travers Property.

If, under the will of his father, Joseph Travers took an estate in fee, which, upon his marriage, became indefeasible and descended to his heirs, it is conceded by the appellants that, as to the Joseph Travers part of the property in question, the decree below is right. If to render his estate indefeasible it was essential that he should leave a child surviving him, it was wrong.

The testator devised all his real estate, except a small portion thereof, to his four sons. By a codicil (Rec., p.

146) he revoked the devise to his daughter Elizabeth and gave that parcel to one of his sons.

In making the devises to his son Elias and a portion to his son Joseph, he made them to such son, "his heirs and assigns forever in fee simple" (Rec., pp. 141, 142). The other devises are to his several sons, "their heirs and assigns forever," without the addition of the words "in fee simple." No devises are in terms of a less estate. That the testator deliberately made the distinction in the terms of these two classes of devises is shown by the "general provision," of the will, to the effect of which he subjects each of the devises of the second class (Rec. pp. 142, 143).

In the codicil of his will, dated June 26, 1848, being the last codicil in which he explained his intentions, Nicholas Travers revoked a devise made in a former will of July 10, 1840, and two other codicils, and provided as follows:

> "And in lieu thereof I do hereby give and devise all of said lots or part of lots, so as aforesaid described, with the house and other improvements and appurtenances, to my son James and his heirs, subject to the express stipulations and restrictions contained in the will to which this is a codicil, wherein I declare that all and every portion of my real estate not devised by the use of the words 'in fee simple,' shall be held by such devisees for life, and then according to stipulations and restrictions as therein contained and declared by said will" (Rec., p. 151).

The Estate of the First Taker.

The language of the devises was, without more, ample to create a fee simple. Qualified by the general provision, each of the devises affected thereby became a determin-

able fee in the first taker, with an executory devise over to the surviving sons and the child or children of such as might be dead.

Abbott *vs.* Essex Company, 18 Howard, 202.
Richardson *vs.* Noyes, 2 Mass., 56.
Underhill on Wills, pp. 1272, 1274.

The general intent must govern the construction.

It is a rule in construing wills that where a general intent is apparent upon the face of the will, and a particular intent is also expressed which conflicts with such general intent, the latter will prevail.

2 Williams on Executors (7th Am. ed.), p. 333.
Chase *vs.* Lockerman, 11 G. & J., 286.
Thompson *vs.* Young, 25 Md., 459.
Taylor *vs.* Watson, 35 Md., 524.
Smith *vs.* Bell, 6 Pet., 68.
In re Banks' Will, 87 Md., 425.

The construction of the will is to be made from the entire instrument, including the codicil, and the intent of the testator thus ascertained be permitted to govern.

In Jones *vs.* Wright, 2 Bligh, 49, the limitation was to the heirs, executors, and administrators. The word heirs was used thirty times. The court declared it a flexible word, and as used by the testator meant children, the result being reached by giving effect to the general intention of the testator.

"We must be guided by the testator's lexicon and understand his language as he defines it."

White *vs.* Crenshaw, 5 Mackey, 115.

Where two clauses in a will operate on the same property, devising it differently, giving it to different

devisees, or showing a different technical intention, the latter clause will prevail.

Dugan *vs.* Hollins, 13 Md., 149.
Manning *vs.* Thurston, 59 Md., 226.

To apply these general principles to the will in question: *The general intent of the testator was that his real estate should descend only through his sons, and that his daughters and their descendants should not have share therein.* This is shown by the fact that practically all the real estate was devised to the sons to the exclusion of the daughters, and by the provision that at the death of any of his sons, without a surviving child or widow, the property not devised to him "in fee simple" should pass to his surviving brothers and the child or children of any deceased brother, and not to his heirs generally.

The son Joseph married, and died intestate, leaving a widow, but no children. The claim of the appellees is, that because he left a widow the conditional fee in Joseph became absolute, and descended to his heirs generally; that is, to his brothers *and his sisters*, thus defeating the general intention that the sisters should not have the land.

The more reasonable construction of the general provision is, that upon the death of Joseph, childless, but leaving a widow, the widow was to have dower as if the fee in Joseph were not determined, but by the executory devise the fee was to pass to the surviving brothers. The reference to the widow was to insure to her dower, not to divert the fee from the sons.

The general intent of the testator being to keep his real estate within the male line of descent, to the exclusion of the female, is it to be supposed that he was willing that this intent should be defeated by the mere marriage of a son? He might be willing to measurably provide for a widow, through an allowance equal to

dower, *but the existence of the widow affords no reason for letting in the daughters to heir.*

Courts will change or mold language so as to give effect to the intention.

> Schouler on Wills, 3d ed., sec. 477.
> Jarman on Wills, 505, 507.
> Doe *vs.* Watson, 8 How., 262, 272.
> Hance *vs.* Noble, 172 U. S., 383, 389.
> Hardenbergh *vs.* Ray, 151 U. S., 126.
> Shugloff *vs.* Johns, 87 Md., 273.
> Scarlett *vs.* Montell, 95 Md., 157.

The words "wife or child or children" should be read wife *and* child or children. The cases cited and many others justify such change.

The auditor says (Rec., p. 82) this—

> "would result in depriving the child of any benefit if the wife should not be living at the death of the devisee, a result which certainly could not have been contemplated."

This is not a just conclusion, for the manifest general intent of the will is that the fee given the sons should be determined only upon death without issue; in case of issue the fee remained to such issue and the wife had dower. When this was followed by providing dower for the wife on the termination of the fee, the testator emphasized his manifest intention that the surviving brothers or their issue should not deprive the widow of dower. There is otherwise no sense in the provision for dower, if death, leaving a widow, made the fee absolute and indeterminable, for the devisee could not in that case have deprived her of dower.

The doctrine laid down by Schouler applies strongly here:

> "The predominant idea of a testator's mind, when discovered, is to be heeded as against all doubtful and conflicting provisions which might of themselves defeat it; and the general intent and particular intent being inconsistent, the latter (the particular) must be sacrificed to the former—the general intent."
>
> Schouler on Wills, sec. 476.

Joseph Travers died, leaving a widow but no child. We submit that, subject to dower in that widow, his surviving brothers, Elias and James, took the fee by way of executory devise, and that it did not descend to the heirs of Joseph.

If we are right in this contention, and the auditor, therefore, erred in letting in the appellees to share as heirs to Joseph, he was equally in error in letting them in to share in the estate devised by Nicholas to his son James, for it will not be contended that James left a child. The appellants deny that he was married.

II.

The James Travers Property.

If the will be construed as we contend, the proceeds of the devises to James, affected by the general provision, must be awarded to the appellants, for it will not be claimed that he left a child surviving him; if, however, this point be ruled against the appellants, they must yet succeed, unless it has been shown, either, first, that James Travers married and his wife survived him; or, second, that he and his brother Elias (the last survivor of the brothers) entered into a binding agreement with their sisters that they should share as heirs in the property thus devised to James. No such marriage was proved, and the alleged agreement or estoppel was not established.

The Alleged Marriage of James Travers.

The original bill, in its fifth paragraph (Rec., p. 2), averred that James Travers died without widow or lawful child surviving him. The answers of the defendants all admitted this averment (Rec., pp. 8, 22). Eighteen months later the defendants, children of his sisters, informed the court by affidavit that—

> "since the filing of the answers to the original bill and since the decree or order of sale passed herein, evidence has been discovered tending to show that James Travers, now deceased, and Sophia V. O'Brien were lawfully married, and that of said marriage there was born the defendant, Annie E. Travers" (Rec., p. 38).

Being permitted to file amended answers, they averred that James Travers died, leaving Sophia V. as his widow, "who was his lawful wife many years," and he left also one child, the defendant, Annie E. Travers, "born of him, the said James, and the said Sophia in lawful wedlock" (Rec., pp. 36, 37).

To prove these most important averments appellees called one witness—the alleged widow.

The woman's story is, that on August 15, 1865, being then domiciled in West Virginia, she and James Travers, whose domicile was in the District of Columbia, visited Alexandria, in the State of Virginia, where a ceremony of marriage was performed by a person who represented himself to be a minister, in the presence of witnesses. She and James Travers then went together to an unidentified hotel on "Shrewsbury River," which the witness locates in New York State (Rec., pp. 54, 62), but which the auditor states is in New Jersey (Rec., p. 82). Here they stayed "about three or four weeks" (Rec., p. 62), when they came to the District of Columbia and stayed three or four weeks (Rec., p. 62), when they went to Belair, Harford,

County, Maryland, where they remained for two years, when they removed to Talbot County, Maryland, where they remained until the summer of 1883, when, James Travers being ill, they repaired to a summer resort known as Point Pleasant, in New Jersey, where he died, October, 1883. The witness says that she learned about five years after the alleged marriage, that the person who officiated was not a minister (Rec. p. 56). She avers that James Travers always treated her as his wife and introduced her as such in the communities where they resided (Rec., p. 57). She produced a mutilated olographic draft of will, dated February 8, 1881, claimed by her to be signed by James Travers, in which she is described as wife; a later will made in his last illness, which also refers to her as wife, and a deed of mortgage made to secure part of the purchase price of the Talbot County farm, dated September 27, 1867 (Rec., p. 72), which describes her as wife, and in which she joined as such. These were all the affirmative proofs of marriage, but, before the case for those asserting the marriage was closed, one of their counsel, desiring to relieve himself of any possible charge of responsibility for the admitted false swearing of this witness, took the stand and testified that she had told him that *no ceremony of marriage was performed* (Rec., p. 70). Defendants then proved by the proper custodian of records of marriage licenses in Alexandria County, Virginia, that no marriage license was at any time issued to James Travers and Sophia Grayson, or either of them (Rec., 76).

This was all the evidence introduced upon the subject of James Travers' marriage. Although the woman in the course of her testimony confessedly swore falsely in asserting when first examined that she had borne living children to James Travers and that one was yet alive, the auditor, Justice Gould, and the Court of Appeals, severally, ignored the testimony of Mr. Colbert, above

noted, accepted her story of a ceremonial marriage as true, and, so accepting it, found that James Travers was lawfully married.

No two of the decisions agree upon the grounds for the finding and all three are unsound.

The auditor held that—

> "conceding that the so-called marriage in Virginia did not . . . create a lawful relation of husband and wife . . . it established a marriage good at common law and being followed by a departure from that jurisdiction and residence in the State of New Jersey for a time immediately following, and again, at a later part of their lives, . . . the status of these parties, following that alleged ceremony, was that of lawful wedlock" (Rec., 85).

This opinion, contradictory in itself in holding that the so-called marriage was at once unlawful by statute and lawful by common law, loses all right to consideration when found to be based on the wholly unwarranted premise that immediately after the supposed ceremony the parties went to New Jersey "where they remained two years" (auditor's op., Record, p. 82). The only testimony on this point is that they stayed at a hotel in New Jersey "about three or four weeks" (Rec., pp. 62, 196).

Justice Gould, in deciding the case, ignored the argument of the auditor, but held there was a valid marriage in Virginia *because the supposed ceremony was conducted by an imposter* and not by an authorized officer or clergyman. This view was based upon an amazing misconstruction of the Virginia statute, was expressly repudiated in the Court of Appeals by counsel for appellees, and was not alluded to by that court in its opinion.

The Court of Appeals' opinion concedes that the pretended marriage was absolutely void in Virginia for the

want of the statutory license, and holds the parties were married only because they lived together in New Jersey for a few months before James Travers died, and he there recognized the woman as his wife.

There is no suggestion, either in the evidence or in the opinion, that any contract was entered into or promise made in New Jersey, *but the alleged cohabitation in that State for a few months, and the devise by James Travers* "to my wife while she remains my widow" (Rec., 129) are declared sufficient to establish *a marriage in New Jersey.*

In the evidence the only allusions to the living in New Jersey are found in the deposition of the alleged wife, at pages 54, 62, 65, of the record, and they amount to no more than that the parties lived there for the time stated. There is no testimony that the parties were reputed husband and wife, unless the statement of the woman, that she always lived with Mr. Travers as his wife and that Travers always introduced her as his wife (Rec., 57), can be taken as establishing such repute.

We submit that the conclusion of the Court of Appeals is wholly untenable.

Was there a Ceremony of Marriage?

The finding that a ceremony of marriage was performed between the parties was error.

This finding is made upon the unsupported testimony of a woman, who, having sworn that she bore two living children to James Travers, and that the defendant, Annie Travers, was one of them (Rec., 55, 69), afterward admitted that this was wholly false, that she bore no living children, and that Annie Travers was the child of another woman (Rec., p. 51); and it wholly ignores the testimony of Mr. Colbert that she told him there was no ceremony (Rec., p. 70). It also ignores the facts that she could name neither the person who performed the

ceremony, nor any of the several supposed witnesses thereto; that she was without any certificate, and that none of James Travers' female relatives at any time had anything to do with her; and that no friend or neighbor was produced to testify that she was reputed to be a wife. There is nothing but the unsupported statement of a perjured witness to show a ceremony, and even this is contradicted by her previous statement to opposing counsel, that there was no ceremony (Rec., 70).

In the very similar case of Arnold *vs.* Cheeseborough (46 Fed., 701, affirmed 58 Fed., 840), the plaintiff's only evidence of a ceremonial marriage was the testimony of the alleged wife. The court refused to accept it. She had testified to a marriage by a clergyman. The court said:

> "She could not give his name, or residence, and stated that no witnesses were present. She made no mention of a marriage certificate or a wedding ring. The testimony did not offer any details tending to fix the place where the alleged marriage took place, or the person performing it, or the attendant circumstances. It suffices to say of it, that it was improbable and incredible."

In the case at bar, the woman testified that the ceremony was performed by a person since dead (Rec., 56), whose name she had known but had forgotten (Rec., 56, 62), at a house she does not describe, in the presence of two witnesses, of whom she says: "I don't remember who they were and did'nt know anything at all about them" (Rec., 62), and she obtained no certificate (Rec., 62), makes no mention of a ring and she also admitted to Mr. Colbert that there was no ceremony (Rec., 70).

To this add the evident refusal of the woman's aunt, and of Travers' sisters to recognize the relation as lawful during the whole period of the cohabitation (Rec., 63, 64), and the sworn answers in this cause of the children of two of those sisters (Rec., 22) admitting the averment

of the 5th paragraph of the bill that James Travers died without widow or lawful child, and we have the strongest circumstantial evidence against the idea that there was ever a ceremony of marriage, or that the woman *ever believed herself married; certainly the reputation in the Travers family was always distinctly the other way.*

See also the power of attorney from Elias and James Travers to Thos. J. Fisher & Co., dated October 25, 1882 (one year before the death of James), witnessed by the alleged wife in her name of "S. V. Grayson" (Rec., p. 155).

The witness proved herself unworthy of belief, and this discredited her entire testimony. When first examined in October, 1902, she swore that she bore two living children to James Travers, one of whom was still living, and gave details of their births (Rec., 54, 55, 60, 67, 68, 69), but when recalled to complete her deposition, three months later, admitted that her story of the children was wholly false (Rec., 51, 52).

> ". . . courts of justice, under such circumcumstances, *are bound upon principles of law and morality and justice to apply the maxim, falsus in uno falsus in omnibus.* What ground of judicial belief can there be left when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood."
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> The Santissima Trinidad, 7 Wheat, 339.
> Dunlop *vs.* Patterson, 5 Cowen, 243.
> Huber *vs.* Teuber, 3 McArthur, 484.

See, also—

2 Elliott on Ev., sec. 955.

It will be claimed that the witness, having no pecuniary interest in the outcome of this suit, had no interest in testifying falsely as to the circumstances of the beginning of her relations with James Travers. This is incor-

rect; she had married her husband, O'Brien, as *widow* of James Travers. Surely she had the strongest possible motive to maintain on the stand that she had not voluntarily become and remained James Travers' mistress.

The testimony of the woman should thus have been rejected as wholly unworthy of belief, and with this out of the case there would not have been the slightest evidence that James Travers was ever married, except the recitals of his mutilated will of 1881 (Rec., 75), of his will of 1883 (Rec., 74), and of the mortgage deed of September 27, 1867 (Rec., 72).

The Deed and the Wills as Proofs of Marriage.

The mortgage, and the will of 1881, were both made in Maryland, where the "common law marriage," so called, is unknown, and a ceremony *in faciæ ecclesæ* is necessary to a valid union. Denison *vs.* Denison, 35 Md., 297

The will of 1883 seems to have been made in New Jersey, where a looser rule prevails, but where a *contract to marry* is as important as it is in Maryland.

The mortgage recital was made in 1867, when James Travers wanted credit, and had either to make such statement or excuse his refusal by stating the discreditable fact. The circumstances of the making of either will are not disclosed. Who wrote the last one, or who gave the draftsman his instructions is not shown. There is nothing but the bare statement above James Travers' signature that he was married. The suggestion that a presumption of truthfulness attaches to a will, is dissipated here by the fact that in the will of 1883, the statement that the woman is his wife is coupled with the falsehood that Annie is "our daughter."

Such declarations, as was said in Arnold *vs.* Cheeseborough, do not "make a marriage nor do they even, directly or affirmatively establish it" (46 Fed., p. 701).

We submit that without supplemental proof of reputation among neighbors and friends, the unsworn recitals of the mortgage and wills do not even tend to prove a marriage.

Baldwin *vs.* Maryland, 112 U. S., 490.
Barnum *vs.* Barnum, 42 Md., 251.

The auditor and the courts should have found there was no marriage in fact.

Reading Fire Ins. Co.'s Appeal, 113 Pa., 204.
Arnold *vs.* Cheeseborough, 46 Fed., 701.
S. C. affirmed, 58 Fed., 840.

No Proof of Repute as Wife.

The Court of Appeals had no basis in the evidence for the assertion in its opinion that "during the whole time he called her and introduced her as his wife, *and she was so recognized in the community generally. They removed to Point Pleasant, New Jersey, in 1883, and she was there recognized and reputed to be his wife until his death*" (Opinion, Rec., p. 206).

The only witness sworn was the woman. She certainly could not establish *her own repute* as married. To ask a witness his own reputation for truth and veracity, or for honesty, would be justly regarded as ridiculous. Is this less absurd? Moreover, she said nothing whatever of her life at Point Pleasant, before the death of Travers, and, of her life elsewhere, said only that Travers introduced her as his wife, and that she was called "Mrs. Travers" (Rec., 57). This falls far short of proving that "public recognition," which this court has declared "necessary as evidence of its existence," in the case of the marriage without ceremony or record.

Maryland *vs.* Baldwin, 112 U. S., 490, 495.

"By reputation as here used is understood the speech of the people who have an opportunity to know the parties."

Com. *vs.* Stump, 53 Pa. St., 132 (cited 112 U. S., 495).

"The testimony of a single witness is consequently held insufficient to establish reputation as husband and wife."

Com. *vs.* Stump, supra.
Jones *vs.* Hunter, 2 La. Ann., 224.
Taylor *vs.* Swett, 22 Am. Dec., 159, note.

As already shown the negative proof was strong that a contrary repute existed among the relatives of both parties.

Inferential Evidence Not Admissible.

Again, while these declarations are evidence from which, coupled with other proofs not found in this case, marriage *might under other circumstances be inferred*, there is no room for inference testimony that at an indefinite time and place a contract was made, when the parties *have selected a particular time and place for such contract.*

Cunningham *vs.* Cunningham, 2 Dow, 482.
Lapsley *vs.* Grierson, 1 H. L., 498.
Cram *vs.* Burnham, 5 Maine, 213.
Barnum *vs.* Barnum, 42 Md., 251.

In *Blackburn* vs. *Crawfords* this court condemned the line of reasoning which the Court of Appeals here adopted. Speaking of the instructions which authorized the jury to find a marriage from cohabitation and repute,

although they might not think a ceremony was had, as testified by the woman, this court said (3 Wall., p. 194):

> "They submitted to the jury, as a question to be considered, whether there was not a marriage at a different time and place and contracted in a different manner from that alleged by the putative wife, Elizabeth Taylor. Her testimony was clear and positive. It was wholly inconsistent with such a proposition. If there was none such as alleged by her, clearly there was none at any time. This was the hinge upon which turned the controversy. All the testimony clustered about and related to that inquiry. The jury should have been so instructed, and their deliberations confined accordingly. . . .
>
> "The further inquiry did not arise in the case. What was said could hardly fail to mislead and confuse. It permitted them to substitute conjecture for deduction, and opened a field beyond the sphere of the case, where the means of error were abundant."

This case, then, must turn upon the question whether there was a valid marriage between James Travers and Sophia Grayson at Alexandria, Va., on August 15, 1865.

The Virginia Marriage Law; License Necessary.

The Virginia statute of 1849, regulating marriages in that State, and in force in August, 1865, the time of the supposed marriage between James Travers and Sophia Grayson, provided as follows:

> "Section 1. Every license for a marriage shall be issued by the clerk of the court of the county or corporation in which the female to be married usually resides. . . .
>
> "Sec. 2. Every license so issued shall be registered in a book to be kept by the clerk for that purpose.
>
> "Sec. 3. [Has no application.]

"Sec. 4. When a minister of any religious denomination shall, before the court of any county or corporation in this State, produce proof of his ordination, and of his being in regular communion with the religious society of which he is reputed a member, and give bond in the penalty of fifteen hundred dollars, such court may make an order authorizing him to celebrate the rites of marriage.

"Sec. 5. The court of any county which deems it expedient, may appoint one or more persons resident in such county to celebrate the rites of marriage within the same, or a particular district thereof, and upon any person so appointed giving such bond as is required of an ordained minister, may make a like order authorizing him to celebrate the rites of marriage in such county or district, as the case may be. Any order made under this or the preceding section may be rescinded at any future term.

"Sec. 6. Marriages between persons belonging to any religious society which has no ordained minister, may be solemnized by the persons and in the manner prescribed by and practiced in any such society.

"Sec. 7. Every marriage in this State shall be under a license and solemnized in the manner herein provided, but no marriage solemnized by any persons professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such persons if the marriage be in all other respects lawful and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

"Sec. 8. [Has no application.] "

This statute required that in all cases a license should issue and without it there could be no valid marriage. The emphatic decision of the Court of Appeals of Virginia, delivered in 1901, would foreclose

discussion on this subject were it not for the ground taken by Mr. Justice Gould, in sustaining as a marriage the union under discussion.

Offield *vs.* Davis, 100 Va., 250.
Beverlin *vs.* Beverlin, 29 W. Va., 732.

The View of Justice Gould (Rec., 193, 200).

Justice Gould held correctly that the laws of Virginia must control the question of marriage, but he misapplied the terms of the statute.

The statute, after providing by whom marriages may be solemnized to give them validity, seeks to protect the parties from the *false assumption of authority as minister or magistrate*, but the want of authority *in the person* does not dispense with the license. Justice Gould's holding is (Rec., 198), that because the person supposed to have performed the ceremony was not an authorized person, *therefore* the marriage was valid, without license. This leads to the absurd result that a marriage without license by one who is in fact parson, priest, or authorized magistrate is invalid, *while such ceremony performed under precisely similar conditions by an impostor, is valid.* The proposition will not bear argument for an instant, and there is no legal decision to sustain it. The statute reframed so as to express this idea would be as follows:

Every marriage in this State shall be under license, except where performed by an unauthorized person.

It is clear that the "want of authority" mentioned in the statute does not mean absence of a license to the parties, but means "defect in the ordination of the minister or the commission of the justice in whose presence the marriage ceremony was performed."

Com. *vs.* Munson, 127 Mass., 459, 466.

The cases cited by the judge (110 Mass., 314 and 52 N. J., 207), have no bearing on the question. Both involved the Massachusetts statute, which *did not require a license*, and contained express provisions to save marriages in good faith before an officer, or minister, or a person acting as such from invalidity because of informalities in the manner of the ceremony, or lack of authority in him who officiated. In the first case the parties appeared with serious "intent on the part of both to contract marriage," before a justice of the peace, and both believed that they were lawfully married by him, and thereafter cohabited as husband and wife; his testimony that he did not understand that he married the parties at that time, and that all that was said by either was that the plaintiff introduced the woman as his wife," was admitted, but it was held that this misunderstanding of the effect of what was said and done could not invalidate the marriage. The second case is equally inapplicable.

The Virginia Decision Conclusive that Without a License there could be No Marriage in that State.

> "The construction given to a statute by the highest judicial tribunal of such State, is regarded as a part of the statute and is as binding upon the courts of the United States as the text" (of the statute).
>
> Leffingwell *vs.* Warren, 2 Black, 599, 603.
>
> Green *vs.* Lessee of Neal, 6 Peters, 291.
>
> Bauserman *vs.* Blunt, 147 U., S. 652.
>
> Meister *vs.* Moore, 96 U. S., 82.
>
> Fairfield *vs.* County of Gallatin, 100 U. S., 47, 52.

While there are exceptions to the rule that "this court ollows the adjudications of the highest courts of the

State, whatever may be our opinion of its original soundness," (Walker *vs.* State Harbor Commissioners, 17 Wall, 648), this case does not fall within them. Such exceptions are (*a*), where rights of property have been acquired under former contrary decisions of either the State or Federal courts; (*b*), where on the same transactions the Federal court has first passed, and this court approves that decision and disapproves the State decision; and, (*c*), where general questions of commercial law are involved. Such are the cases of Pease *vs.* Peck, 18 How., 595; Burgess *vs.* Seligman, 107 U. S., 20, and Julian *vs.* Cent. Trust Co., 193 U. S., 95.

The weight or authority of the decision is not affected by the fact that it was made after the supposed marriage, and after the persons affected by it had left the State.

Bloodgood *vs.* Grasey, 31 Ala., 575.

We submit, then, that Offield *vs.* Davis settles the question as to the status of these parties in Virginia, and that it must be held that no license to marry having been issued to James Travers and Sophia V. Grayson, the alleged ceremony in Virginia, if performed, gave them no status as married persons in that State, and their cohabitation in that State was unlawful.

A Marriage Void Where Celebrated is Void Everywhere.

> "If by the law governing at the place where the marriage is celebrated, whether between domiciled or transient parties, it is invalid, *it is so also in every other place or country*, no court giving to any foreign transaction or contract a validity withheld from it by the law under which it was

made. This rule is substantially without exception."

Bish. on Mar. Div. & Separation, sec. 886.
Story, Confl. of Laws, pp. 215, 216, 217.
Patterson *vs.* Gaines, 6 How., 550, 587.
Phillips *vs.* Gregg, 10 Watts, 168.
McDeed *vs.* McDeed, 67 Ill., 545.
Hutchins *vs.* Kimmell, 31 Mich., 126.
Dalrymple *vs.* Dalrymple, 12 Hagg. Consist., 58, 59.

English and American decisions of the greatest weight have many times illustrated this rule, from which there has been substantially no deviation.

The rule that a marriage invalid where celebrated is invalid everywhere, is but an example of the general rule governing all contracts.

"A contract of any kind void in the State or country where made is void everywhere. If there are cases in apparent exception to this rule they are not really so, for, from the nature of the rule, it, like its counterpart, does not admit of exception."

Bish. on Contracts, sec. 1383.

"Whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it, or attaching to it, is governed by the law of the contract."

Pritchard *vs.* Norton, 106 U. S. 124, 129.
Wolf *vs.* Johnson, 10 Wheat. 367.
Scudder *vs.* Union Nat. Bk., 91 U. S. 406.
Rich *vs.* Hyatt, 3 McArthur, 536.

That the so-called marriage in Virginia did not create a lawful relation of husband and wife was conceded by the auditor (Rec., p. 85), and by the Court of Appeals

(Rec.,p. 207), and was denied by Judge Gould only because of his misconstruction of the proviso in section 7 of the statute as pointed out.

II.

By What Act, and When and Where Did the Unlawful Cohabitation of These Persons Become Marriage?

1. If the woman who claims to be the wife of James Travers is to be held sufficiently credible to justify the court in receiving her testimony as proof of the facts to which she testifies, this testimony proves the following facts as to the domicile of herself and James Travers after what took place on August 15, 1865, at Alexandria, Va., in the way of a marriage ceremony; that is to say, the only domiciles which they acquired were (1) in the State of Maryland, which was their domicile from the latter part of the year 1865, or the early part of the year 1866, up until some time in the year 1883, and (2) thereafter a domicile, for a few months, in 1883, in New Jersey, and which lasted until the time of his death in October, 1883.

For, although she says that immediately after the ceremony in Alexandria, they went to a hotel on the Shrewsbury River (which is in New Jersey, although she speaks of it as being in New York), they remained there only three or four weeks (Rec., p. 62), going from thence to the City of Washington, remaining there three or four weeks, and thence to the City of Baltimore, where they remained until late in the year 1865, or early in the year 1866, and then took up their residence for approximately two years in Bel Air, Harford County, Maryland; removing thence to Talbot County, where they purchased a farm and lived until some time in the year 1883, and, upon the failure of the health of James Travers, they sold their property there and went to Point Pleasant,

N. J., to live, where he died in October, 1883. The visits to Shrewsbury and to the City of Washington are thus plainly shown to be merely transient visits, made after the marriage ceremony, which took place in Alexandia, Va., preparatory to settling down in Maryland for their residence (Rec., pp. 54 and 62 to 65).

2. As heretofore shown in this brief, what took place in Virginia on August 15, 1865, resulted in no valid marriage between James Travers and Sophia V. Grayson; the absence of a license rendering what took place there (even if the testimony of the woman is to be credited as to what did take place), under the laws of Virginia as authoritatively adjudicated by its highest court in 100 Va., p. 250, Offield *vs.* Davis, absolutely null and void to effect a marriage between the parties; they, therefore, departed from this pretended ceremony as completely a single man and a single woman as if the ceremony had never taken place. This condition of things followed them to Shrewsbury, New Jersey, and to the City of Washington. Whatever cohabitation took place between them in these places was therefore not a matrimonial cohabitation,but was an unlawful and meretricious cohabitation, whatever may be the law as to the requirements of valid marriage, either in New Jersey or in the City of Washington; for there is no pretense that during this interval any new agreement of marriage was entered into between the parties, and whatever cohabitation took place between them in this interval took place because of, and is to be referred to, the invalid transaction which took place between them in Alexandria, Va.

Not only is there no pretense made in the testimony of the woman that their cohabitation grew out of, or was because of, anything else than the ceremony which took place at Alexandria, but she distinctly states that she did not discover that the person who performed the ceremony (and as to whom she says she was under the im-

pression that he was a minister) was not a minister, until some five years after the ceremony had been performed (Record, pp. 56-57).

It can not admit of controversy, therefore, that when James Travers and Sophia V. Grayson took up their residence and acquired their domicile in the State of Maryland in 1865 or 1866, no marriage status existed between them; he was a single man and she was a single woman, and though they were cohabiting together, their cohabitation was not matrimonial, but was unlawful because it was referable only to the pretended marriage ceremony which took place in Virginia, and not under any new contract of marriage entered into thereafter before going into Maryland, even if such subsequent contract could validly constitute them husband and wife.

3. Furthermore, as by the law of Maryland, no valid marriage could be entered into in that State unless celebrated by a religious ceremony; and as the witness states that there never was any ceremony of marriage performed between her and James Travers except the one in Alexandria, Va. (Rec., p. 57), it necessarily follows that none of the cohabitation which took place between James Travers and Sophia V. Grayson during their residence and domicile in Maryland, was a matrimonial cohabitation, but was unlawful and meretricious during all of the time during which this residence and domicile continued from 1865 or 1866, up to their departure from Maryland some time in the year 1883.

Therefore, all of the testimony of the woman that during their life in Maryland she lived with James Travers as his wife, that she was recognized by him as his wife, that he introduced her as his wife, and that she was received and treated splendidly, is altogether immaterial and ineffective as proof of a valid marriage; equally ineffective for this purpose is the fact that she joined with him in the deed of mortgage of the land purchased by

him in Talbot County (Rec., p. 72), and the fact, if it is a fact, that he executed the will produced in a mutilated form by the witness and bearing date February 8, 1881 (Rec., p. 75).

Dennison *vs.* Dennison, 35 Md., 361.
McLaughlin *vs.* Barnum, 42 Md., 297.
Richardson *vs.* Smith, 80 Md., 89.

In the *Dennison* case there was no claim of a ceremonial marriage, but it was alleged and the court assumed, that from January, 1863, until the death of the man in 1870, the parties lived as husband and wife, having mutually agreed to be and regard each other as such; the woman was maintained and supported by the man to the time of his death as his wife, and they both acknowledged, recognized and acted toward each other as husband and wife, and were known, treated and reputed to be such among their friends snd acquaintances (pp. 370, 371)

The court, after a most careful study of the laws of marriage, held this union to be no marriage, and that in Maryland "to constitute a lawful marriage some religious ceremony must be superadded to the civil contract."

4. When, therefore, James Travers and Sophia V. Grayson transferred their residence and domicile from Maryland to New Jersey some time in 1883, they entered that State not in the condition of man and wife, but as a man and a woman living and cohabiting unlawfully together. Being, therefore, in this condition when they took up their residence and domicile in New Jersey, it necessarily follows that this same condition existed at the time of his death on November 1, 1883, *unless it is satisfactorily established by credible proof in the case*, that a new agreement of marriage, *valid under the laws of New Jersey*, was entered into between the parties, *after they established their domicile in New Jersey*.

5. In determining this question we admit that it is the

established law of New Jersey that neither a license from the State nor a religious ceremony is necessary to constitute the creation of the status of marriage between a man and a woman; but that all that is needed to create a valid marriage status is that the man shall declare, in words of the present tense, that the woman is his wife, and that the woman shall assent.

52 N. J. Law, 208, Smith *vs.* Smith.
62 N. J., 401, Atlantic City R. R. Co. *vs.* Goodin.

6. We submit that when all the testimony is considered in the light of the principles applicable to the subject established by the highest court of New Jersey it can not be found that any new agreement of marriage was entered into between James Travers and Sophia V. Grayson after they took up their domicile, in 1883, in New Jersey.

(*a*) We will first examine her testimony so far as it is applicable to the question which we are now considering.

She gives an account of the marriage ceremony in Alexandria on August 15, 1865, her temporary sojourn at the hotel on the Shrewsbury River, and in the city of Washington, in Harford and Talbot counties in Maryland (Rec., 54), the still-birth of two children, and the birth thereafter of two other children, Ida and Annie (the former of which died before she grew up and the latter being still living). She further testifies of the discovery by her, some five years after her marriage, of the fact that the person who performed the ceremony in Alexandria was not a minister; she then says that she always lived with Mr. Travers as his wife, but that no other ceremony of marriage was ever performed between them (Rec., 57).

She was also asked:

> "Q. In the various places in which you lived with Mr. Travers, and to which you have already testified, were you regarded in the community as his wife?"

This question being objected to by counsel, was not answered.

She was then asked:

> "Q. How did Mr. Travers regard you in that relation?"

Her answer is:

> "A. Why, as his wife."

She was further asked:

> "Q. How did Mr. Travers introduce you in the *community* in which you resided?"

Her answer was:

> "A. Always as his wife; I have old friends who live in *Talbot County and in Bel Air (Maryland)* who would prove that if it was necessary" (Rec., 54 to 57).

She was asked on cross-examination (pages 65 and 66) as to her residence in Talbot County, Maryland, and as to that residence she said she was always treated splendidly and received everywhere, had the very best friends and acquaintances, and always stood well with them. She further identified as those of James Travers the signatures to the papers offered in evidence by the appellees; that is to say, the mortgage from herself and Travers to Banning (Rec., 72), the mutilated will of 1881 (Rec., 75), and also the will bearing date October 5, 1883 (Rec., 129), in which are made devises and bequests to his wife without naming her.

(b) *It will be observed that of the above-mentioned documents the only one which was executed after James Travers took up his residence and domicile in New Jersey in 1883 was the will bearing date October 5, 1883.* It will also be observed that while she says she always lived with Mr. Travers as his wife, she, when asked

how he *introduced* her in the *community* in which they resided, said, "Always as his wife." She accompanies the declaration by saying, "I have old friends who live in Talbot County and in Bel Air, who would prove that if it were necessary."

Her testimony, therefore, fairly considered upon the subject of how she was introduced, is to be interpreted as limiting this introduction while she was a resident of Maryland.

The Cohabitation in New Jersey.

The record shows little of the residence in New Jersey. The woman says only that they went there for the benefit of Travers' health, and purchased property—all else is left to conjecture (Rec., 57, 62, 65).

We quote in full what she testified as to this matter, and there was no other testimony upon the subject:

> P. 57. "We lived at Point Pleasant. We sold our farm in Talbot County in 1883, on account of Mr. Travers' health failing, and then we went to Point Pleasant and purchased property there, and after his death I remained there ever since."
>
> P. 62. ". . . and from Talbot we went to Point Pleasant."
>
> P. 65. "Q. Then you went to Talbot County? A. Yes, and lived there continuously until Mr. Travers' health failed, and he thought the seashore would do him good, and we went to Ocean County, Point Pleasant, New Jersey. . . . Yes, went there to reside in 1883."

6. But assuming, *ex gratia argumenti*, that they cohabited as man and wife; that she was treated and acknowledged as his wife after they took up their residence in New Jersey, such cohabitation and acknowledgment did not constitute the marriage status between them; at the best, *and in the absence of evidence as to the real facts*, they would be only *prima facie* evidence that a mar-

riage had *theretofore* taken place between them. For it is well settled that cohabitation, acknowledgment and reputation do not *create* the marriage status, but that they are only facts from which, *under certain circumstances*, a *prima facie* presumption arises that theretofore a marriage had taken place between the parties; that is, that the union was from the first lawful.

> "There can be no doubt that cohabitation and reputation will under some circumstances justify a presumption of marriage. They do not constitute marriage, but may in a case where no *actual marriage, legal or illegal* is shown, and where nothing appears in the conduct of the parties to indicate that their relations were illegal rather than matrimonial, justify the court in presuming that the parties originally came together, mutually promising to take each other for husband and wife during their joint lives."
>
> 46 N. J. Equity, 413, Voorhees *vs.* Vorhees.
> 52 N. J. Law, 208, Smith *vs.* Smith.

7. We now submit that the cohabitation between James Travers and Sophia V. Grayson, after they removed to New Jersey in 1883, can not, under the facts and circumstances proved in this case, create any presumption that a new contract of marriage was entered into after their entry into the State of New Jersey, for the reasons now to be stated.

8. In the following discussion of the question of whether James Travers was ever validly married to Sophia V. Grayson in New Jersey, we shall *first* assume that both James Travers and Sophia V. Grayson believed what he told her; that is to say, that, in consequence of what took place in Alexandria, they were validly married.

(*a*) As we have already seen, if the testimony of Sophia V. Grayson is to be credited, the cohabitation

between her and James Travers originated in the marriage ceremony which took place in Alexandria, Va.; that about five years thereafter, she discovered that the person whom she supposed to be a minister, and who performed the marriage ceremony, was not a minister, but simply a friend of James Travers. This fact became the subject of an interview between them; she was asked what she said, and her testimony is as follows:

> "Q. After you discovered, some four or five years after you went to live with Mr. Travers, that you had not been married to him according to any ceremony, did he ever make any promise to you in that regard?"
>
> "A. Always, poor fellow; he would have it all right."
>
> "Q. And what did he say?"
>
> "A. Well, he would always say that it was all right, and we were just as much married as if we had been married before a priest or a minister."

She had previously testified that from the time of the marriage ceremony up to the discovery above mentioned she always lived with Mr. Travers as his wife.

(*b*) Having thus begun their cohabitation upon the strength and because of the marriage ceremony in Alexandria, and continued it thereunder during the four or five years that elapsed before she discovered that the person who performed the ceremony was not a minister, (which discovery was made while they were living in Maryland), it is entirely clear, if her testimony is to be credited, that the cohabitation in Maryland after the discovery, was continued by virtue of the marriage ceremony which took place at Alexandria; because James Travers claimed, and she assented to the claim, that though the person who performed the ceremony was not a minister, the marriage was just as valid as if he had been a priest or a minister.

(*c*) It is affirmatively testified by her that there was no other ceremony of marriage performed in addition to the Virginia ceremony (Rec., 57).

Upon the assumption above stated (par. 8 of this brief), nothing could more strongly show that all of their cohabitation in Maryland as husband and wife, and whatever introduction by him of her in this character took place, were all founded upon, and are to be referred back to the ceremony which took place in Alexandria; and that the parties, while they lived in Maryland, did not entertain the thought that there was any reason or necessity for the making of any new contract of marriage, or having any further marriage ceremony to perfect their marriage status; and that they continued, during the 17 years of their residence in that State, to let their marriage rest upon what had taken place in Alexandria, and do nothing more of any kind to perfect it.

It is, therefore, impossible to suppose that when they left Maryland in the year 1883, because of James Travers' health, and went to live at Point Pleasant in New Jersey, the transfer of their domicile was accompanied by any new agreement between them for entering into the marriage relation. It is inconceivable, if they really intended to be husband and wife in Maryland, and did not consider what had taken place in Alexandria sufficient for the purpose, that they would not have had a new ceremony performed and in such manner as to make them husband and wife in Maryland.

If it be true, therefore, that during their long residence in Maryland they did not consider it was necessary to have any further ceremony of marriage, and cohabited together as man and wife, and she was acknowledged by him as his wife, it is inconceivable that when they transferred their residence to New Jersey for a few months

before the death of James Travers, (which transfer was owing altogether to the supposition that his health would be benefited by the transfer), the thought entered into their minds that they would, or must, enter into a new contract of marriage upon going into New Jersey. There is, of course, no pretense in the testimony of Sophia V. Grayson, that any such contract was entered into. Upon the contrary, she said no new marriage ceremony took place; this must mean that no new contract of marriage was made (47 N. J. Eq., 555).

Moreover, it is impossible to suppose that any new contract of marriage would be entered into between the parties (upon the assumption upon which we are now discussing the case), as neither of them can be supposed to have known that there was any necessity for such contract or any reason for entering into it.

(*d*) The necessary conclusion from the foregoing is that all the acts of James Travers or the woman claiming to have been his wife, after they went into New Jersey, whether a cohabitation or acknowledgment by him of her as his wife, took place on the basis of the original transaction between them in Alexandria, Va., on August 15, 1865, and none of these acts can therefore be considered as evidence that after they went into New Jersey a new contract of marriage was entered into between them.

9. In the light of the foregoing, we refer the court to the principles applicable thereto as established by the decisions of the New Jersey courts.

It is the settled law of New Jersey, as it is of other jurisdictions, that the validity of what took place in Virginia on the 15th of August, 1865, to constitute James Travers and Sophia V. Grayson man and wife, is to be determined by the law of Virginia at the time of the transaction, and that if by that law there was no valid

creation of the status of husband and wife, nothing that took place there created that status between them in any other State or jurisdiction.

Clarke *vs.* Clarke, 52 N. J. Equity, 650.
Smith *vs.* Smith, 52 N. J. Law, 208.

Therefore, as by the statute law of Virginia as authoritatively determined by its highest court (as heretofore shown) what took place in Virginia on August 15, 1865, did not create any marriage status between James Travers and Sophia V. Grayson, it necessarily follows that unless a marriage status was created between the parties above named after they went into the State of New Jersey in 1883, by a valid contract there entered into between them to be and become husband and wife, she was not his wife at his death in October, 1883.

10. It has been adjudged as the law of New Jersey, that mere proof of cohabitation as man and wife, by a man and a woman, and the acknowledgment of each other as husband and wife before the world, does not create the marriage status between them; and that where it is in proof that no marriage ceremony has taken place between the parties, then proof of cohabitation as man and wife will not prove that a marriage has taken place between them, but in such a case it is necessary that there should be proof of a contract of marriage, assented to by both parties, entered into between them.

Goldbeck *vs.* Goldbeck, 18 N. J. Equity, 42.
Smith *vs.* Smith, 52 N. J. Law, 208.

If, therefore, we are right in our contention as above made that under the facts and circumstances of this case it is impossible for the court to find that any contract of marriage was entered into between James Travers and Sophia V. Grayson after they entered the State of New Jersey, it necessarily follows that they were not man and

wife at the time of the death of James Travers, inasmuch as no status of marriage between them was created by the proceedings in Virginia and during all of their life in Maryland they had been living without being husband and wife, and, therefore, in unlawful and meretricious relations.

11. Wherever it has been shown that an actual marriage ceremony has taken place, though it be an illegal one, and it is shown that the cohabitation and acknowledgments took place in pursuance of this ceremony, the subsequent cohabitation, acknowledgment, and reputation of the parties will he considered as having had their origin in such marriage ceremony, and will not justify a presumption that the parties contracted a subsequent marriage.

Voorhees *vs.* Voorhees, 46 N. J. Equity, 414, 415, and 416.
Cartright *vs.* McGown, 121 Ill., 401 and 402.
Randlett *vs.* Rice, 141 Mass., 394.
Wallace's Case, 49 N. J. Law, 535.
Pearson *vs.* Hovey, 6 Halst, 23.

The well-established rule is that when an abortive attempt is made to prove a marriage at a fixed time and place parties will not—

"be permitted to rely upon other facts and circumstances as a ground of presumption that a marriage *may* have taken place at some different time and place."

Barnum *vs.* Barnum, 42 Md., 251, 297.
Blackburn *vs.* Crawfords, 3 Wall., 175.

This rule was most clearly stated by the Supreme Court of Pennsylvania, a State which gives effect to the agreement *per verba de presenti.*

"When the relation between a man and woman living together is illicit in its commencement, it is

presumed to so continue until a changed relation is proved. Without proof *of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation* of a relation between them which was of illicit origin."

Appeal of Reading Fire Ins. Co., 113 Pa. St., 204.

See, also, Hunt's Appeal, 86 Pa., 294,

Lapsley *vs.* Grierson, 1 H. L., 498.

Cunningham *vs.* Cunningham, 2 Dow, 482.

As already shown, the decision of this court in Blackburn *vs.* Crawfords (3 Wall., 194), directly condemns such reasoning as that indulged in by the Court of Appeals in this case, and rejects presumptive evidence where an attempt to prove a valid ceremony has failed.

To the same effect are many State decisions.

Cartwright *vs.* McGown, 121 Ill., 388.
O'Gara *vs.* Eisenlohr, 38 N. Y., 296.
Rose *vs.* Rose, 67 Mich., 619.
Williams *vs.* State, 44 Ala., 24.
Jones *vs.* Jones, 45 Md., 144.
Williams *vs.* Williams, 46 Wis., 464.

The Voorhees case above cited came on appeal before the Court of Errors and Appeals in 1890 (Collins *vs.* Voorhees, 47 N. J. Eq., 555) and was affirmed, Chief Justice Beasley delivering the opinion. On the facts the case is nearly in point. Voorhees had obtained a fraudulent divorce from his wife, and thereafter married a second time, the so-called second wife being ignorant that the divorce was void. Subsequently the first wife obtained a divorce. Voorhees continued to cohabit with his second wife and treated her before the world as though he were married to her until he died.

"It was urged that such cohabitation formed the basis of an inference that there had been an

> interchange of consent to marriage after the dissolution of the first marriage."

The court rejected this inference and held—

> "that an interchange of consent was not to be deduced from cohabitation accompanied with matrimonial habit and repute, in a case wherein it appeared that the parties had been living together as husband and wife by force of a ceremonious marriage, to which as a valid act one of the parties, in point of fact, had not consented."

The court found that what Voorhees—

> "did consent to was to deceive the so-called second wife and to live with her with the appearance of being married to her; he did not consent to marry her in any legal sense whatever. Under these circumstances . . . his continued cohabitation with this woman, after the obstacle to their marriage had been removed, did not prove that he had changed his original intent, which was to live with her without being legally married to her. It was deemed that cohabitation with habit and repute being accompaniments of the original *status* could not *per se* be taken as proof that a new *status* had been agreed to by the parties."

In the Voorhees case, as in the case at bar, the woman was asked while testifying: "Was any other marriage ceremony ever performed in which you and Abraham Voorhees were the contracting parties?" And answered, "There was not." The court, commenting on this, said:

> "She made no pretence of any other interchange of consent to marriage between herself and the man she cohabited with except such as had been given at the time of their ceremonious nuptials. Most certainly this evidence, if we apply to it the ordinary legal tests, is entirely conclusive, and absolutely proves that there never was any second marriage, in any form whatever, between these

parties. It is to be borne in mind that cohabitation with matrimonial habit and repute is, standing alone, nothing more than testimony in proof of marriage; the conduct of the persons to whom it relates does not constitute marriage, and, consequently from its evidential nature, it is liable to be rebutted by other proofs."

It appears quite certain from the New Jersey decisions that the courts of that State would refuse to find that James Travers and Sophia Grayson were ever husband and wife, and would hold that their cohabitation in that State is wholly without probative force in view of what is shown as to the Virginia ceremony and the Virginia laws.

The true doctrine is that cohabitation and reputation do not constitute marriage, but are evidence upon which in proper cases a presumption of marriage may be founded.

Clark *vs.* Clark, 52 N. J. Eq., 650.
Smith *vs.* Smith, 52 N. J. Law, 208.
Goldbeck *vs.* Goldbeck, 18 N. J. Eq., 42.
Williams *vs.* State, 44 Ala. 24.

In the Alabama case cited the court said:

"Cohabitation, though evidence of marriage, can not make a void marriage valid."

And the Wisconsin court said (46 Wis., 464):

"And in order to establish a marriage subsequent to the commencement of such unlawful and meretricious conduct by continued cohabitation, conduct, and declarations of the parties, or by reputation, there should be some affirmative evidence showing that the relations of the parties were changed, and that that which was meretricious and unlawful in its commencement had been rendered lawful."

In the case at bar there is no evidence that the relations of the parties were changed at any time.

12. In paragraph "8" of the preceding discussion, we said that we would, *first*, assume that both James Travers and Sophia V. Grayson believed what he told her; that is to say, that in consequence of what took place in Alexandria, they were validly married, but if her evidence is to be taken at all it shows that he never believed that there was any legal marriage between them, and that she was aware of the fact that no legal marriage had taken place, at least as early as four or five years after they began to live together, if not before.

In view of the declarations made by her to Mr. Colbert (Rec., 70), when he was inquiring of her with a view of determining whether an amended answer should be filed on behalf of his clients, setting up a marriage by James Travers with this woman, that no ceremonial marriage had taken place between her and James Travers, but that they had lived together as man and wife, it is altogether questionable whether any ceremony of any kind ever took place in Alexandria.

But, assuming that the ceremony testified to by her did take place, then, according to her testimony, some four or five years after the ceremony in Alexandria (Rec., 56–57) she ascertained that the person who performed the ceremony in Alexandria was not a minister at all, but a *Washington friend* of James Travers, and that they were then both told by this Washington friend "*that they were not married*, and *he begged James Travers to do what was right.*" Both of them must have understood by this declaration that in order to constitute themselves husband and wife it would be necessary for them to have a proper marriage ceremony performed, valid under the laws of the State in which it took place, and accompanied by all other things made requisite by that law. The reply of James Travers was,

"that it was all right, and they were just as much married as if they had been married before a priest or a minister." Therefore, in the face of the declaration by the man who had pretended to perform the ceremony of marriage, that *nothing that had taken place then had made them man and wife*, and that they were, at the time of this conversation, cohabiting without being man and wife, they both determined that they would do nothing to make that a valid marriage, but chose to continue their cohabitation without doing anything to make themselves man and wife. Certain it is that James Travers, at least, knew from the beginning that what had taken place in Alexandria was but a mockery of marriage (even if any ceremony of any kind did take place in Alexandria), for he procured a person who was an old friend of his in Washington, and who, of course, he knew not to be a minister, to pretend that he was one. Having thus deliberately conceived this fraud, the court is entirely justified in also believing that he knew what was so easily to be ascertained; that is to say, that a license was required under the laws of Virginia. But from the beginning he determined to defy all obligations of the law, and entered into what he knew to be illicit relations with Sophia V. Grayson; and in this agreement to defy the law, she concurred from the period of time when she was informed by the person who had performed the marriage ceremony, *that they were not legally married.*

13. In this condition of things they continued to reside in Maryland for some twelve years thereafter.

In Maryland they could only acquire the marriage status by a religious marriage ceremony; and yet they refused to have such ceremony performed. When, therefore, they transferred their domicile for a few months into New Jersey, they went there with the knowledge that they had been living together all these years without the sanction of a legal marriage.

In this connection, and in order to show the character of life he was leading, we refer to the testimony with reference to the parentage of the two girls Annie and Ida, who, while they were his children, *were not hers*, as she finally admitted under oath in her testimony given at Philadelphia (Rec., 51); although when examined in Washington she had not only testified under oath that both of them were her children by James Travers, but *gave the time of their birth*, the *street and the number of the house in New York* in which they were born, and the names of the respective midwives who had attended her when she gave birth to them. She admitted in Philadelphia, that the mother of Annie was a young girl of 15, and *that she was present when the child was born*. In her testimony in Philadelphia, while admitting that she had sworn falsely as to Annie and Ida being her children, she gave as her *only excuse* for her *false oath*, her desire to *shield Annie;* but this does not in any way explain why she should take a false oath in reference to the motherhood of Ida. Moreover, her testimony that Annie was her child by James Travers, was a very material fact if she and James Travers were married, in reference to the construction of the will of Nicholas Travers.

14. If we are correct in our contention that James Travers knew that he had defied the law in reference to the requirements of a legal marriage with Sophia V. Grayson, then even if she was not a party to this defiance of law, it is very clear that all cohabitations between the parties, and any acknowledgments by him of her as his wife in New Jersey, can not in any way be considered as evidence of any legal contract of marriage made between them in New Jersey, even if it could be contended that it would be otherwise, if they both in good faith believed that what took place in Virginia (if it did take place) made them lawfully husband and wife.

Never having been husband and wife in Maryland, and

knowing that while they cohabited there together as husband and wife, and acted towards each other as if they were husband and wife, with the knowledge, at least on his part, and in all probability on her part, they were so doing in defiance of the requirements of law, the continued cohabitation and acknowledgment of each other as husband and wife in New Jersey for the few months of their life there, can not be held as evidence of any contract of marriage made between them in New Jersey, or of any intention on their part to change the actual status of their relations as it existed when they went into New Jersey. The status which existed in Maryland continued in New Jersey.

Certain it is that while they lived in Maryland, neither their cohabitation as man and wife, nor the acknowledgment by him of her as his wife, whether orally or in the mortgage or in the will of 1881, offered in evidence, operated in any way to convert their unlawful relations into a legal status of marriage. There can not, in the nature of things, be any reason why the same character of acts taking place across the New Jersey line should have the effect of creating, under the circumstances of this case, the status of a valid marriage.

In support of our contention, we refer the court to the following cases:

Voorhees *vs.* Executors of Voorhees, 46 N. J. Equity, 413.

Collins, Guardian, etc., of Voorhees, *vs.* Voorhees, 47 N. J., 555.

Cartwright *vs.* McGown, 121 Ill., 401 and 402.

Atlantic City Ry. Co. *vs.* Goodin, 62 N. J. Law, 400.

The cases in this court of Meister *vs.* Moore, 96 U. S., 76, and Maryland *vs.* Baldwin, 112 U. S., 490, will be cited to support our opponent's contention that from cohabitation the court will assume marriage, but these cases

are not against us. In the first a Michigan marriage was in question and this court, finding that the Supreme Court of Michigan had held a contract of marriage *per verba de presenti* valid under the laws of that State, held that this concluded the subject, saying: "That construction must be controlling with us" (p. 82). In *Maryland* vs. *Baldwin*, a Pennsylvania marriage was in question, and the court was guided by the decisions of that State.

The Law of Status of Persons.

In complete harmony with the rule that the validity in any State of a marriage will be referred to the law of the place where the alleged marriage occurred, is the law for determining the status of persons. This must be decided by reference to the law of the State or country *where such status or condition had its orgin, and the status so ascertained adheres to the party everywhere.*

Ross *vs.* Ross, 129 Mass., 243, and cases cited.
Smith *vs.* Kelly's Heirs, 23 Miss., 167.

The English cases to this point are collected and reviewed in the decision by Gray, Ch. J., in the Massachusetts case.

So a person born before wedlock, who in the country of his birth is deemed illegitimate, may not, by a subsequent marriage of his parents in another country, by whose laws such a marriage would make him legitimate, cease to be illegitimate in the place of his birth.

Story, Confl. of Laws, secs. 93, 106.
House of Lords in Mauro *vs.* Saunders, 6 Bligh, 468.
Rose *vs.* Rose, 4 Wills & Shaw, 289.

We submit that the court should have held that James Travers did not leave a widow surviving him.

III.

The Supposed Agreement.

The first answers of the appellees (Rec., pp. 8, 9, 10, 11, 12, 13) to the original bill, set up in substance that *several years before the death of Joseph Travers*, which occured September 12, 1882, an agreement was entered into by *Joseph*, James, and Elias to the effect that their three sisters should be admitted to share with them in the estate devised by the will of Nicholas Travers, their father.

To these answers the complainants excepted, on the ground that they did not aver that the agreement alleged was in writing, as required by the Statute of Frauds. To these exceptions the defendants in question submitted, and they took leave to amend.

The amended answers (Rec., pp. 19, 20, 21, 23, 24, 25) aver that this agreement was made *shortly before the death of Joseph*, and that in December, 1882, it was—

> "*embodied in a written agreement*, wherein it was provided that in consideration of love and affection, and to avoid any more dispute and litigation, the several lots which had been devised to the said Joseph, James, and Elias should thereafter be considered freed from the trust provisions created by said will and codicils" (Rec., p. 23).

There are no "trust provisions" in the will, but it may be assumed from the recitals which follow this averment of the contents of the supposed writing, that by this language it is meant that the sisters were to share equally with James and Elias in all the property which by the will of their father was devised to Joseph and to James, and was covered by the "general provision."

The claim then is:

(*a*) That an agreement was entered into in the lifetime of Joseph.

(*b*) That this was reduced to writing and signed by James and Elias after the death of Joseph.

(*c*) That the agreement was based upon a certain and recited consideration.

(*d*) That it referred to the property held by Joseph and to other property held by James.

The Proofs.

There is no proof whatever that any writing of the kind in question was ever made. No witness testifies to having seen a paper of this nature, and no letter offered in evidence, competent or incompetent, declares that such writing was made.

One witness only was sworn on this point, a Mr. Stellwagen, of the firm of Thos. J. Fisher & Co., real estate agents, since 1878. His testimony proves only what is conceded, to wit: That after the death of Joseph Travers and beginning with May, 1883, the rentals from the properties devised to Joseph by his father's will, were collected by these agents and were distributed equally to Elias, James, and their three sisters. After the death of James, in October, 1883, the rents from his Washington properties, devised to him by his father, were distributed to Elias and his three sisters or their representatives. *To this one fact of the distribution of the rents, in the manner stated, for about seventeen years, neither the witness nor any of the papers thrust into the record adds in any way.*

Twelve letters from Mr. William B. Webb, attorney at law, to Mrs. Mitchell, will be found in the record (pp. 111 to 116). All were objected to as incompent, and the objection is yet insisted on, for they all appear to have been written by Mr. Webb to his client, Mrs. Mitchell, and the writer does not assume to speak for Elias or for James in what he writes. He does not mention James, nor

is it shown by any proof that he had any relations with James, or with Joseph. But if admitted, the letters prove nothing. Only two of them, we think, touch even remotely upon the matter in question. One of these, written to Mrs. Wynne, December 5, 1882 (Rec., p. 112), recites that Elias "admits after considering the matter" that Joseph's estate was his absolutely, and is to be shared by his brothers and sisters equally; and the other, addressed two days later, to Sister Mary Agatha Travers, recites that a legal opinion of the counsel for the Baltimore and Potomac R. R. Co. has declared that the property of Joseph descended to the brothers and sisters alike, subject to the widow's dower; that this opinion was submitted to Elias, "who consents to it," and has directed Mr. Webb to prepare a paper for all the brothers and sisters of Joseph to sign, which will put this conclusion in shape to be acted on (Rec., p. 113).

This is the end of the proofs of the agreement, alleged by the answers of the appellees to have been made for a consideration, and to have been reduced to writing, signed by James and Elias.

No letter from anyone declares or recites that the agreement *was ever written*, and we can only infer that Elias exercised his right to withdraw his concurrence in Mr. Webb's opinion, and declined to sign, or that no writing was ever drawn up. Such a document as is set up in the answers would be signed as well by the sisters as by the brothers, and, for such signatures, would have been sent them by mail with appropriate letters, but no letter of the kind is produced. If duly executed, Mr. Webb's first act would be to record the paper which passed rights in more than $200,000 of property. There is no such record.

But if everything contained in the letters be given effect as proof, the "agreement" set up has yet no support, for it is apparent from Mr. Webb's letters that his

only understanding with Elias Travers was upon the legal interpretation of the will as it affected the estate devised to Joseph. *There is no hint that the property held by James was referred to between them.* Neither is there a hint that there was an agreement for a consideration. Nor is there a syllable of evidence to prove the averment that such "agreement" was ever discussed in the lifetime of Joseph, or that it was ever known to James.

This defense, then, must fail for either of two reasons:

1st. The statute of frauds requires that such contract as is set up be proved by a writing. No writing is produced, nor is it shown that one ever existed.

2d. The allegations are not supported by the proofs. The variance between the allegations and the proofs is of itself enough to defeat the claim.

> "A party can no more succeed upon a case proved but not alleged than upon a case alleged and not proved."
>
> Foster *vs.* Goddard, 1 Black. (U. S.), 506, 508.
> Boone *vs.* Chiles, 10 Pet., 177, 208.

In the last case cited this court rejected all proof of a deed offered by defendants, because in their answer they had claimed under a contract to purchase, and had not averred a deed in consummation thereof.

The variance was not as great as in the case at bar.

Again: The agreement was averred by the answers to have been made, "in consideration of love and affection and to avoid any more dispute and litigation." Not a word of evidence of this was given. The only litigation over Nicholas Travers' estate was ended more than thirty years before.

The defense then should be rejected as not proved.

The Suggestion of Estoppel.

In the courts below the appellees claimed an estoppel upon the assertion of sole title by the heirs of Elias, because for about seventeen years the rentals were shared by the sisters. Except for the letters of Mr. Webb relating to the lands of Joseph, and reciting that Elias had yielded to his (Webb's) legal opinion that the title to those lands descended to all the heirs of Joseph, there is no explanation of this method of division. Whether it was due to generosity in Elias and James, then old men, for their sisters (one of whom appears to have been poor), or to a mistaken view of their legal rights is not explained. There can be no claim of a ripened right growing out of such division for twenty years, for *less than seventeen years* passed before the assertion by Elias' heirs of their claim of exclusive right in June, 1900, when the bill in this case was filed.

The claim of estoppel stands, then, upon the proposition that because the sisters and their children received for seventeen years rents which did not belong to them, but which they were permitted to receive, the title of the owners has passed to them by estoppel. It will be impossible to support this contention upon principle or by precedent.

Legal Essentials to Estoppel in Pais.

Where the estoppel relates to the title to real property it is essential that the party claiming to have been influenced by the conduct or declaration of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. *When the condition of the title is known to both parties, or both have the*

same means of ascertaining the truth, there is no estoppel.

Brant *vs.* Coal Co., 93 U. S., 326, 335, 337.
Shaw *vs.* Chambers, 48 Mich., 359.
Kingman *vs.* Graham, 51 Wis. 247.
Rose's Notes to U. S. Rep., vol. 8, p. 982, for collection of cases.

The doctrine of estoppel in pais always presupposes error on one side, and fault or fraud on the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.

Morgan *vs.* R. R. Co., 96 U. S., 716.
Merchants Bank *vs.* State Bank, 10 Wall., 604.
Brant *vs.* Coal Co., 93 U. S., 326.
Parker *vs.* Barker, 2 Met., 423.
Hill *vs.* Epley, 31 Pa. St., 331.
Hamlin *vs.* Sears, 82 N. Y., 327.
Martin *vs.* Angell, 7 Barb., 407.

> "Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights, have no such ingredient, and seldom work any such result."
>
> Henshaw *vs.* Bissell, 18 Wall., 255, 271.

One must have by fraud or culpable negligence *led* another into belief of a certain state of facts; and such fraud or culpable negligence must have been the proximate cause of that other acting upon such belief to his prejudice.

Leather Mfg. Bk. *vs.* Morgan, 117 U. S., 96–109.
Ency. Am. & Eng. Law, vol. 11, pp. 424–5–6.

If the letters of Mr. Webb be read all that will appear from them is that Webb persuaded Elias Travers that his (Webb's) construction of the "general provision" of the will of Nicholas Travers was correct, and that because Joseph Travers left a wife, all his heirs at law were entitled to share the particular lands. To this opinion Elias Travers relunctantly yielded, as Mr. Webb states, and from the fact that James apparently acquiesced in the subsequent division of rents from the property on that basis, it may be assumed that Elias convinced him that the claim of their sisters' attorney was legally sound.

There was no representation of facts, but only a concurrence in legal opinion. This constituted no basis for an estoppel.

> Ency. Am. & Eng. Law, vol. 11, p. 425, and cases.
> 2 Pomeroy Eq. Jur., secs. 843 to 849.

In Ricard *vs.* Williams, (7 Wheat., 59), this court said:

> "If, indeed, the party be in under title, and by mistake of law, he supposes himself possessed of a less estate in the land than really belongs to him, the law will adjudge him in possession of, and remit him to, his full right and title. For a mistake of law shall not in such case prejudice the right of the party and his possession, therefore must be held coextensive with his right."

The only effect of the submission of Elias and James Travers to the erroneous opinion of Mr. Webb was to enable their sisters and their children to obtain quarterly, for a number of years, rents to which they were not entitled. Surely this raised no equitable estoppel upon Elias and his children to prevent them from asserting their sole title.

The Lease Offered in Evidence.

The appellees offered in evidence a lease from Elias and James Travers and their sisters to Freeborn G. Smith of part of the property in question contained in the devise to Joseph, in which lease the lessors are described as heirs of Joseph, and upon it claim an estoppel.

Given the fullest effect it is a recital of heirship, and a lease as such heirs. But this is no estoppel on the brothers from asserting that they had title not derived from Joseph and that their sisters had no title.

The *lease* is not in litigation; its recitals are immaterial, and amount only to a declaration.

> 20 Ency. Am. & Eng. Law, pp. 459, 460.
> Carpenter *vs.* Suller, 8 Mees. & W., 209.

A mistake of fact by the auditor must be noticed. He says (Rec., p. 88):

> "The conditions, management, and enjoyment of the property as here detailed extended over a period of twenty years."

This is an egregious error. Joseph Travers died September 12, 1882 (Rec., pp. 2, 92). There was no correspondence between the brothers and their sisters until after that event. (See letters, Rec., p. 112 et seq.). The first division of rentals from the estate of Joseph was May 1, 1883 (Rec., pp. 96, 123), and the powers of attorney to collect these rentals were dated in October and December, 1882. (Rec., p. 97).

The original bill in this cause was filed June 8, 1900 (Rec., p. 1), or less than eighteen years after Joseph Travers died.

By no process of mathematics can twenty years of acquiescence be figured out of these facts. All dates in proof were simply ignored by the auditor in the statement quoted.

There is nothing in the case which can operate to transfer title from the appellants, or to make it wrong for them to assert their right, nor is there any evidence of a purpose in their ancestors to divide the corpus of the property.

Parol Partition.

At the hearing before Mr. Justice Gould the appellees argued that the division of the rents was to be regarded as a parol partition which the court would not disturb. How a division of rents can be set up as a partition of the land, was not explained, or how this action for partition could be sustained if there was a prior partition. The point was not made in the Court of Appeals, but since it may be made in this court we discuss it.

1. The answers, original and amended, do not assert that there ever was a parol partition. In fact, the defendants' claim is that they are tenants in common with the appellants of all the lands involved in these proceedings, and that the appellants are estopped from denial of such common tenancy (Rec., pp. 21, 24).

Having set up a case of estoppel, and not a parol partition, the defendants may not shift their ground.

Foster *vs.* Goddard, 1 Black, 506, 518.

2. There could not have been a partition by parol or otherwise. Partition means division between owners (joint or common), so that each shall hold his own part in severalty.

Anderson's Dict., tit. Partition.

Here, confessedly, there was no division into separate parcels. No one of these defendants (children of the sisters) has ever claimed that any defined part of the estate, determined by lot and square or by metes and bounds, was ever set apart to his ancestor. This must

have been done if there was partition. If partition had been asserted in the answers it would have been a complete defense, and the court would not have proceeded to decree partition (or sale) until this issue was disposed of.

3. Courts of equity will not recognize an agreement to partition unless followed by exclusive possession in severalty. To this effect are all the cases and text book statements cited by our opponents in their brief on the subject in the court below. Freeman on Cotenancy and Partition (sec. 404) says:

> "But in order to uphold a partition . . . it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed, and followed by a several possession by either the parties themselves or their grantees."

Mr. Freeman also indicates, in section 402, that the agreement to partition must be so far executed that a bill for specific performance on the ground of part performance would lie; that is, "whenever it has been carried into execution by the parties."

> "To bar a right to partition conferred by law, by setting up a voluntary partition, it should be manifested by a writing, or a definite oral partition into defined parts, accompanied by possession in severalty of the respective parcels, and should be clearly proven."
>
> 33 W. Va., 494, Patterson *vs.* Martin.

An examination of all the authorities cited by opposing counsel on this subject in the court below shows that there has been no decided case supporting a supposed parol partition *where exclusive possession of a definite parcel*, taken under the parol agreement, has not been clearly proven.

See 17th Ency. of Law (1st ed.), p. 668 et seq.

Again, to sustain the claim of parol partition it must be insisted that there were several such agreements; one after the death of Joseph, in 1882, and another after the death of James, in 1883; but even then the claim must fail, for Elias and his heirs continued up to the filing of this action to receive rents from the properties held by Joseph and James, as tenants in common thereof, and to hold in severalty the property devised to Elias by his father.

It is submitted that in the pleadings there is no allegation, and in the evidence no proof, of a parol partition, or of any agreement to divide the corpus of the property. The proof shows only an erroneous construction of the ancestor's will, and a consequent erroneous division of income from rents, which can not affect title to the land.

It is submitted that the decree below should be reversed and the cause remanded with directions to reverse the decree of the Supreme Court of the District of Columbia and direct the account to be restated, that the proceeds of sales of the properties in question may be awarded to the representatives of Elias Travers.

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